

1999

State of Utah v. Todd Michael Medsker : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH,

Plaintiff/Appellee,

v.

TODD MICHAEL MEDSKER,

Defendant/Appellant.

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Priority No. 2

Case No. 990266-CA

BRIEF OF APPELLANT

Appeal from a Plea of Guilty to One Count
of Possession of a Controlled Substance, a Third
Degree Felony taken by Judge Michael D. Lyon in the
Second District Court of Morgan County

FILED

JUN 30 2000

COURT OF APPEALS

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH,

Plaintiff/Appellee,

v.

TODD MICHAEL MEDSKER,

Defendant/Appellant.

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IN THE UTAH COURT OF APPEALS

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|-----------------------|---|--------------------|
| STATE OF UTAH, | * | |
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| | * | |
| Plaintiff/Appellee, | * | |
| | * | |
| v. | * | Priority No. 2 |
| | * | |
| TODD MICHAEL MEDSKER, | * | Case No. 990266-CA |
| | * | |
| Defendant/Appellant. | * | |

JURISDICTION AND NATURE OF PROCEEDING

This is an appeal from a sentence imposed after the Defendant plead guilty in the Second District Court of Morgan County to one count of Possession of a Controlled Substance, a third degree felony in violation of U.C.A. §58-37-8 (1953, As Amended).

Jurisdiction to hear the above-entitled appeal is conferred upon the Utah Court of Appeals pursuant to U.C.A §78-2a-2 (e) (1953, As Amended) and Rule 26 of the Utah Rules of Criminal Procedure.

STATEMENT OF ISSUES PRESENTED ON APPEAL
AND STANDARD OF REVIEW

POINT I

The Trial Court Committed Plain Error When it Failed to Strictly Comply with Rule 11(e) of the Utah Rules of Criminal Procedure in Taking the Defendant's Plea of Guilty.

Standard of Review

The question of whether the trial court strictly complied with constitutional and procedural requirements for entry of a guilty plea is a question of law that is reviewed for correctness. *State v. Benvenuto*, 983 P.2d 556, 558 (Utah 1999)

Citation to Record

Despite Defendant's failure to move for a withdrawal of the plea of guilty, this court can review defendant's guilty pleas for plain error or exceptional circumstances. *State v. Price*, 837 P.2d at 580.

POINT II

The Defendant Was Denied His Constitutional Right to Effective Assistance of Counsel When His Attorney Advised Him to Plead Guilty to the Charges and When Counsel Failed to Move for Withdrawal of the Pleas When It was Obvious that the Defendant was Unable to Voluntarily Make Such a Plea.

Standard of Review

Where ineffective assistance of Counsel is raised for the first time on appeal, the Appellate Court must determine as a matter of law whether the Defendant was denied effective assistance of counsel. *State v. Callahan*, 866 P 2d 590 (Utah App 1993)

Citation to the Record

The Defendant alleges Ineffective Assistance of Counsel for the first time on appeal. The Appellate Court must determine as a matter of law whether the Defendant was denied his constitutional right to effective assistance of counsel even absent an objection in the trial court.

CONSTITUTIONAL PROVISION, STATUTES AND RULES

UNITED STATES CONSTITUTION

Amendment VI --In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of counsel for his defense.

Amendment XIV, Section 1 – All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

UTAH STATE CONSTITUTION

Article 1, Sec. 7 – No person shall be deprived of life, liberty or property, without due process of law.

Article 1, Sec. 12 – In criminal prosecutions the accused shall have the right to appear and defend in person and by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to be confronted by the witnesses against him, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed, and the right to appeal in all cases. In no instance shall any accused person, before final judgment, be compelled to advance money or fees to secure the rights herein guaranteed. The accused shall not be compelled to give evidence against himself; a wife shall not be compelled to testify against her husband, nor a husband against his wife, nor shall any person be twice put in jeopardy for the same offense.

Where the defendant is otherwise entitled to a preliminary examination, the function of that examination is limited to determining whether probable cause exists unless otherwise provided by statute. Nothing in this constitution shall preclude the use of reliable hearsay evidence as defined by statute or rule in whole or in part at any preliminary examination to determine probable cause or at any pretrial proceeding with respect to release of the defendant if appropriate discovery is allowed as defined by statute or rule.

UTAH RULES OF CRIMINAL PROCEDURE

Rule 11(e)

The court may refuse to accept a plea of guilty, no contest or guilty and mentally ill, and may not accept the plea until the court has found:

- (1) if the defendant is not represented by counsel, he or she has knowingly waived the right to counsel and does not desire counsel;
- (2) the plea is voluntarily made;
- (3) the defendant knows of the right to the presumption of innocence, the right against compulsory self-incrimination, the right to a speedy public trial before an impartial jury, the right to confront and cross-examine in open court the prosecution witnesses, the right to compel the attendance of defense witnesses, and that by entering the plea, these rights are waived;
- (4)
 - (A) the defendant understands the nature and elements of the offense to which the plea is entered, that upon trial the prosecution would have the burden of proving each of those elements beyond a reasonable doubt, and that the plea is an admission of all those elements;
 - (B) there is a factual basis for the plea. A factual basis is sufficient if it establishes that the charged crime was actually committed by the defendant or, if the defendant refuses or is otherwise unable to admit

culpability, that the prosecution has sufficient evidence to establish a substantial risk of conviction;

- (5) the defendant knows the minimum and maximum sentence, and if applicable, the minimum mandatory nature of the minimum sentence, that may be imposed for each offense to which a plea is entered, including the possibility of the imposition of consecutive sentences;
- (6) if the tendered plea is a result of a prior plea discussion and plea agreement, and if so, what agreement has been reached;
- (7) the defendant has been advised of the time limits for filing any motion to withdraw the plea; and
- (8) the defendant has been advised that the right of appeal is limited.

STATEMENT OF THE CASE

This is an appeal from the conviction entered after the defendant plead guilty to one count of Possession of a Controlled Substance, a Third Degree felony in violation of U.C.A. §58-37-8 (1953 As Amended). On February 11, 1999, the trial Court sentenced Appellant to serve a term of zero to five years at the Utah State Prison, which term was suspended upon the completion of 120 days of home confinement and successful completion of probation.

Mr. Medsker appeals his conviction and sentence based upon (1) the fact that the trial court failed to strictly comply with Rule 11(e) of the Utah Rules of Criminal Procedure in taking Defendant's plea; (2) the Defendant was denied his right to due process of law and effective assistance of counsel when his attorney erroneously advised him to plead guilty to the charge when it was obvious that he did not understand the charges against him; and (3) the Defendant was denied his right to due process of law and

effective assistance of counsel when his new counsel failed to file a motion to withdraw the plea and proceeded to sentencing.

STATEMENT OF FACTS
With citations to the Record¹

The Defendant, Todd Michael Medsker, was originally charged with Possession of a Controlled Substance, Possession of Paraphernalia and Driving Under the Influence. The charges arose after the Defendant was involved in an accident in which Defendant was life flighted to the Hospital for his injuries. Defendant sustained neurological injuries due to the accident. (Entry of Plea Pg. 4 & Sentencing Pg. 3)

Prior to the preliminary hearing, it was brought to the Court's attention that a plea bargain had been made and Mr. Medsker would plead guilty to the third degree felony in exchange for the dismissal of the other charges. (Entry of Plea Pg. 2)

Mr. Medsker's defense counsel at the time of the plea hearing, Michael J. Boyle, advised Mr. Medsker to plead guilty as indicated above. Despite Mr. Medsker's obvious confusion with the situation, the trial Court accepted his plea of guilty and set the matter for sentencing. (Entry of Plea Pg. 2-12)

Prior to sentencing, Mr. Medsker hired new counsel to assist him. Mr. Medsker's sentencing attorney, Glen A. Cook, failed to file a motion to withdraw Defendant's plea

¹ The transcript of the trial court proceedings were improperly numbered; therefore, all citations to the record in relation to the trial court proceedings will be addressed by the heading indicated on the volume of the transcript and the page number as reflected on the transcript by the court reporter.

of guilty and proceeded to sentencing. At sentencing, Mr. Cook continually referred to Defendant's inability to understand or recall any involvement in a crime, and used Defendant's neurological and cognitive injuries for mitigating factors, but never requested that the Court withdraw his plea of guilty. (Sentencing Pgs. 2-6)

Mr. Medsker was ultimately sentenced to serve a term of zero to five years in the Utah State Prison for his plea of guilty to the third degree felony. The prison term was suspended and he was placed on probation with 120 days of home confinement. The Defendant now appeals based upon the following:

SUMMARY OF ARGUMENTS

The trial court allowed Defendant to enter a plea of guilty without strictly complying with provisions of Rule 11(e) of the Utah Rules of Criminal Procedure. The trial court's failure to strictly comply with the rule constituted plain error because there was an obvious error, the trial court should have been aware of the error and the error was prejudicial to the Defendant.

The Defendant was denied his constitutional right to effective assistance of counsel when both of his attorney's failed to move to withdraw his plea. Each of his attorneys were aware that Defendant was incapable of understanding the elements of the charges, yet neither attorney moved to withdraw the plea. The record clearly shows that Defendant was acting solely on the advice of counsel when entering the plea and was without the understanding necessary to constitute a knowing and voluntary plea. The

errors by counsel were prejudicial to Defendant and Defendant should be afforded a new trial wherein he can have effective assistance of counsel.

ARGUMENTS

POINT I

THE TRIAL COURT COMMITTED PLAIN ERROR WHEN IT FAILED TO STRICTLY COMPLY WITH RULE 11(E) WHILE TAKING DEFENDANT'S PLEA OF GUILTY

Despite Defendant's failure to move for a withdrawal of the plea of guilty, this court can review defendant's guilty pleas for plain error or exceptional circumstances. *State v. Price*, 837 P.2d 578, 580 (Ct. App. 1992). To Succeed on a claim of plain error, a defendant has the burden of showing "(i) an error exists; (ii) the error should have been obvious to the trial court; and (iii) the error is harmful." *State v. Dunn*, 850 P.2d 1201, 1208 (Utah 1993); accord *State v. Marvin*, 964 P.2d 313, 318 (Utah 1998).

In the case at bar it was obvious that the Defendant did not understand what he was doing and was only acting on advice of his attorney. Rule 11(e) of the Utah Rules of Criminal Procedure governs the taking of pleas. That rule states:

- 11(e) The court may refuse to accept a plea of guilty, no contest or guilty and mentally ill, and may not accept the plea until the court has found:
- (1) if the defendant is not represented by counsel, he or she has knowingly waived the right to counsel and does not desire counsel;
 - (2) **the plea is voluntarily made;**
 - (3) the defendant knows of the right to the presumption of innocence, the right against compulsory self-incrimination, the right to a speedy public trial before an impartial jury, the right to confront and cross-examine in open court the prosecution witnesses, the right to compel the attendance of defense witnesses, and that by entering the plea, these rights are waived;

- (4) (A) **the defendant understands the nature and elements of the offense to which the plea is entered**, that upon trial the prosecution would have the burden of proving each of those elements beyond a reasonable doubt, and that the plea is an admission of all those elements;
- (B) there is a factual basis for the plea. A factual basis is sufficient if it establishes that the charged crime was actually committed by the defendant or, if the defendant refuses or is otherwise unable to admit culpability, that the prosecution has sufficient evidence to establish a substantial risk of conviction;
- (5) the defendant knows the minimum and maximum sentence, and if applicable, the minimum mandatory nature of the minimum sentence, that may be imposed for each offense to which a plea is entered, including the possibility of the imposition of consecutive sentences;
- (6) if the tendered plea is a result of a prior plea discussion and plea agreement, and if so, what agreement has been reached;
- (7) the defendant has been advised of the time limits for filing any motion to withdraw the plea; and
- (8) the defendant has been advised that the right of appeal is limited.
(Emphasis Added)

The record clearly demonstrates that Defendant did not understand the nature and elements of the crime of possession of a controlled substance. The following exchange between the Court and Defendant reflect the Defendant's complete reliance on defense counsel's advice without an understanding of what was going on:²

Court: I assume you understand what the States' evidence is so that you appreciate the negotiation that Mr. Boyle has prepared for you.
Defendant: Yes.

² It should be noted that the Defendant's waiver of his Preliminary Hearing and the actual Plea Hearing overlap. Defendant relies upon the fact that the Court was pursuing both the waiver and the plea at the same time in making this argument and that the court was considering more than just the record of the plea hearing, and was looking at the surrounding facts and circumstances as approved by the State of Utah in *Salazar v. Warden, Utah State Prison*, 852 P.2d 988, 992 (Utah 1993).

Court: Do you feel good about that in light of what you believe the State's evidence to be?

Defendant: I'm assuming it's correct, yes.

Court: You understand that you have a right to have your day in court?

Defendant: I'm just going with what he [Mr. Boyle] says.

Court: And that's appropriate and that's why you hire a lawyer. But I also think that it's important for a client to always also exercise his own independent judgment based on what he believes the evidence is and, and to, you know, kind of think for yourself. Have you done that?

Defendant: Well I can't, I can't really say what, I can't defend myself if that's...

(Entry of Plea Pgs. 3-4)

Defense counsel immediately interjected and offered a proffer of evidence that would support the plea at this point. The Court never returned to assess if the Defendant used his "independent judgment" in making his plea and continued on with the remainder of the plea hearing. The trial court's failure to assess the voluntariness of the Defendant's plea was clear error because he failed to strictly adhere to rule 11(e)(2) and find that the plea was voluntarily made.

There have been numerous cases decided in the appellate courts of this jurisdiction relating to the taking of guilty pleas. Each case requires strict compliance with Rule 11(e) and this Court has repeatedly overturned guilty pleas when the trial court failed to strictly comply with the rule. As held in *State v. Ostler*, 2000 UT App 28, 388 Utah Adv. Rep. 43 (Ct. App. 2000), "it should have been obvious to the trial court that the requirements were never discussed with the Defendant on the record and that failure to do so constitutes plain error." (Citations omitted).

Based upon the extensive examination of the taking of pleas by the Courts in this jurisdiction, it should have been obvious to the trial court that an error was made. The Court's acceptance of the plea under those circumstances constitute plain error.

The trial court's error was prejudicial to Defendant. In *Henderson v. Morgan*, 426 U.S. 637, 645, 96 S. Ct. 2253, 2258, 49 L. Ed. 2d 108 (1976) the Supreme Court held:

[I]t is too late in the day to permit a guilty plea to be entered against a defendant, solely on the **consent of the defendant's agent--his lawyer**. Our cases make absolutely clear that the choice, to plead guilty must be the defendant's: it is he who must be informed of the consequences of his plea and what it is that he waives when he pleads, *Boykin v. Alabama*, 395 U.S. 238, (1969); and it is on his admission that he is in fact guilty that his conviction will rest. *Henderson*, 426 U.S. 637, at 650 (Emphasis Added).

In the case at bar, the record clearly shows that Mr. Medsker was acting solely on advice of his counsel, without any independent understanding of the charges he was pleading to. Since Defendant was without that understanding, this Court should remand this case back to the District Court to allow Defendant to withdraw his plea of guilty.

POINT II
**THE DEFENDANT WAS DENIED HIS CONSTITUTIONAL
RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL
WHEN HIS TRIAL ATTORNEY'S ADVISED HIM TO
PLEAD GUILTY OF A CRIME HE HAD NO MEMORY OF
AND FAILED TO MOVE TO WITHDRAW HIS PLEA**

In the event that this Court finds that the trial court did not commit plain error by accepting the Defendant's plea, it should find that Defendant was denied his right to effective assistance of counsel at the plea hearing and at sentencing. Both of Defendant's defense attorneys were aware that Defendant was not capable of voluntarily entering a

plea and still advised Defendant to do so. Neither attorney moved to have the plea withdrawn despite the fact that they each proffered Defendant's limited capabilities to the trial court.

Both the United States Constitution and the Utah Constitution guarantee persons charged with a criminal offense the right to effective assistance of counsel to assist in their defense. *See U.S. Const. Amend. VI; U.S. Const. Amend. XIV, Section 1; Utah Const. Art. 1, Section 7; Utah Const. Art. 1, Section 12; See also Strickland v. Washington*, 466 U.S. at 667 at 697, 104 S.Ct. 2052 (1984); *State v. Templin*, 805 P.2d 182 (1990). Mr. Medsker was denied this constitutionally guaranteed right and; therefore, the Defendant's plea should be set aside and Defendant should be allowed to proceed with a defense to the charges.

To successfully assert a claim of ineffective assistance of counsel, the Appellant must show that (1) her counsel's performance was objectively deficient, and (2) that there exists a reasonable probability that but for counsel's deficient conduct, the verdict would have been more favorable to the defendant. *State v. Cummins*, 829 P.2d 848 (Utah App. 1992); *State v. Templin*, 805 P.2d 182, 186 (Utah 1990)

Mr. Medsker was represented by two attorneys in the trial court. At the plea hearing his attorney was Michael J. Boyle and at the sentencing he was represented by Glen A. Cook. Defendant asserts that each of his trial attorneys acted deficiently requiring reversal of his conviction.

A. Ineffective Assistance by Michael Boyle

Mr. Medsker entered a plea of guilty to the charge of Possession of a Controlled Substance on December 18, 1998. It is obvious from the Defendant's statements at the Plea Hearing (as indicated in the above argument) that he did not enter his plea voluntarily. It is Defendant's position that Mr. Boyle acted deficiently when he advised Defendant to plead guilty to the charge of possession of a controlled substance when he knew that Defendant had no independent recollection of the events leading to his arrest for the charges and was not capable of making such a plea.

Despite the obvious problems Mr. Medsker had with his cognitive abilities and the his lack of independent memory regarding the incident, Mr. Boyle recommended that he plead guilty to the charges. Mr. Boyle never requested that Mr. Medsker undergo any sort of psychological testing to determine if he was competent to enter a plea and advised the Defendant to enter the plea knowing that Mr. Medsker had suffered neurological and cognitive injuries in the accident.

Mr. Medsker's incompetency to knowingly enter a plea is reflected in his inability to assist his counsel in his defense. Mr. Medsker made it perfectly clear to the court and his counsel that he was without the memory to state that he actually committed the crime that he was pleading to. (Entry of Plea P. 3) He also stated that he could not represent himself and was only acting on his attorney's advice. (Entry of Plea P. 4).

A person is incompetent to proceed in a criminal action if he is suffering from a mental disorder or mental retardation resulting either in: (1) his inability to have a

rational and factual understanding of the proceedings against him or of the punishment specified for the offense charged; or (2) his inability to consult with his counsel and to participate in the proceedings against him with a reasonable degree of rational understanding. See U.C.A. §77-15-2 (1953 As Amended).

Mr. Medsker was unable to actively participate in the proceedings against him and acted solely upon the advice of Mr. Boyle. Mr. Boyles' failure to adequately investigate the Defendant's mental capabilities prior to advising Defendant to enter a plea of guilty rendered his representation objectively deficient. Mr. Boyle was aware of the Defendant's limited abilities due to the accident; however, he still advised Mr. Medsker to plead guilty and interjected in the Court's colloquy with Defendant regarding his understanding of the proceedings instead of allowing the Court to see the Defendant's complete confusion.

Defendant was prejudiced by counsel ineffective assistance of counsel and would have received a more favorable outcome had counsel acted appropriately.

B. Ineffective Assistance by Glen A. Cook

Mr. Cook's representation of the Defendant was objectively deficient when he failed to move for a withdrawal of the Defendant's plea of guilty and failed to do an adequate investigation into the case. The transcript clearly reflects that the Defendant did not make his plea knowingly and voluntarily as indicated above. As a result of the accident which instigated the criminal charges against Defendant, Mr. Medsker suffered neurological injuries and had difficulty with his cognitive abilities.

Although Mr. Cook used the Defendant's neurological injuries in argument for mitigation of sentencing, Mr. Cook never requested that Defendant's plea of guilty be withdrawn on that basis. Mr. Cook never requested that the Defendant be examined to determine whether or not he was even capable of giving a plea. Defense counsel openly admitted to the Court that he felt that Defendant had some "cognitive and neurological issues". Defense counsel also stated that he found some issues in "communicating rather simple ideas to him" and that sometimes he would say something and "will receive a stare and I have to repeat it again". (Sentencing Pg. 5).

Despite Defendant's obvious problems understanding the legal system and the proceedings against him, Mr. Cook never investigated further to determine if Defendant's plea should be set aside due to his impairment.

Mr. Cook's failure to adequately investigate the Defendant's neurological and cognitive problems is obviously deficient representation. As ruled in *State v. Templin*, 805 P.2d 182, 188 (Utah 1990) "failure of counsel to adequately investigate... cannot fall within the 'wide range of professional assistance' referred to in *Strickland*."

Absent the deficient representation given by Mr. Cook, there is a reasonable likelihood that the Defendant would have prevailed on his motion to withdraw his guilty plea. The confusion of the Defendant at the plea hearing negates the trial court's determination that the Defendant made a knowing and voluntary plea. Rule 11(e) of the Utah Rules of Criminal Procedure provides that prior to accepting a guilty plea, a trial court must determine that the defendant understands the nature and elements of the

offense. *State v. Thurman*, 911 P.2d 371, 284 Utah Adv. Rep. 3 (Utah 1996). In addition to confirming that the defendant understands the elements of the crime, the trial court must determine that the defendant "possesses an understanding of the law in relation to the facts" for the defendant's plea to be "truly voluntary." *State v. Breckenridge*, 688 P.2d 440, 444 (Utah 1983) (quoting *McCarthy v. United States*, 394 U.S. 459, 466, 22 L. Ed. 2d 418, 89 S. Ct. 1166 (1969)).

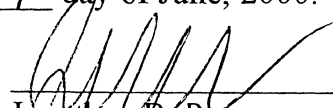
It is obvious that the Defendant's neurological and cognitive impairments made it impossible for him to make a knowingly and voluntarily plea. Had Mr. Cook made a motion to withdraw the plea and have Defendant examined regarding his ability to enter the plea, the Defendant had a good chance of succeeding on his claim. However, he opted to use Mr. Medsker's impairment as a mitigating factor at sentencing rather than ensure that he voluntarily made a plea.

Mr. Cook's failure to investigate the Defendant mental abilities resulted in a violation of the Defendant's constitutional right to effective assistance of counsel.

CONCLUSION

Based upon arguments set forth above, the Appellant's judgement and conviction should be overturned and the matter remanded to the trial court for further proceedings wherein his constitutional rights shall be protected..

RESPECTFULLY SUBMITTED this 29 day of June, 2000.



Jonathan B. Pace
Attorney for Appellant

CERTIFICATE OF MAILING

I hereby certify that I mailed, postage prepaid, two (2) true and correct copies of the foregoing APPELLANT'S BRIEF to the following:

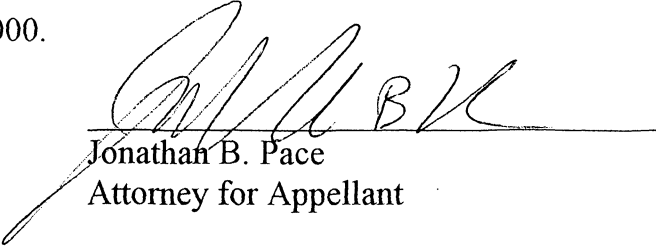
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Todd Michael Medsker
Defendant/Appellant
4751 Linda Vista Lane
Boise, ID 83704

DATED this 29 day of June, 2000.



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ADDENDUM “A”
Entry of Plea Hearing

1 P-R-O-C-E-E-D-I-N-G-S

2 THE JUDGE: Are we ready with the
3 Medsker matter?

4 MR. POORMAN: I believe we are, Your
5 Honor. I think Mr. Boyle is speaking with his
6 client. Mr. Hamilton is here (short inaudible,
7 no mic).

8 UNIDENTIFIED SPEAKER: Yes, I'm ready
9 to roll.

10 THE JUDGE: Okay. Well, let's do it.
11 (Other matters called).

12 THE JUDGE: -- vs Todd Michael Medsker.

13 MR. POORMAN: Your Honor, we have
14 reached a resolution in this matter.

15 THE JUDGE: Would you--

16 MR. POORMAN: It's my understanding
17 that the defendant is going to waive his
18 preliminary, preliminary hearing scheduled for
19 today and at his arraignment would plead guilt to
20 the third degree felony of possession of
21 methamphetamine in exchange for which the State
22 would move to dismiss the paraphernalia charge
23 along with the DUI. The basis for this, Your
24 Honor, is Mr. Medsker was involved in an
25 automobile accident. He was life-flighted to

1 the U of U, I believe--.

2 (End of Tape 98-40. Tape 98-41 turned on late,
3 portion of hearing not recorded.)

4 THE JUDGE: You understand your right,
5 your right to have a preliminary hearing,
6 Mr. Medsker?

7 THE DEFENDANT: Yes I do, Your Honor.

8 THE JUDGE: Are you waiving that right
9 today?

10 THE DEFENDANT: Yes.

11 THE JUDGE: You seem reluctant. Are
12 you troubled with something?

13 THE DEFENDANT: No. I just, I don't
14 really remember a lot, you know, even leaving
15 Boise. As far as anything else I just, I don't
16 know, it's just-- I mean, just like the car
17 wreck itself I don't, it's like it never happened
18 to me. I just came to and--

19 THE JUDGE: I assume you understand
20 what the State's evidence is so that you
21 appreciate the negotiation that Mr. Boyle has
22 prepared for you.

23 THE DEFENDANT: Yes.

24 THE JUDGE: Do you feel good about that
25 in light of what you believe the State's evidence

1 to be?

2 THE DEFENDANT: I'm assuming it's
3 correct, yes.

4 THE JUDGE: You understand you have a
5 right to have your day in court?

6 THE DEFENDANT: I'm just going with
7 what he says.

8 THE JUDGE: And that's appropriate and
9 that's why you hire a lawyer. But I also think
10 that it's important for a client to always also
11 exercise his own independent judgment based on
12 what he believes the evidence is and, and to, you
13 know, kind of think for yourself. Have you done
14 that?

15 THE DEFENDANT: Well I can't, I can't
16 really say what, I can't defend myself if
17 that's--

18 MR. BOYLE: Maybe if I can maybe give
19 the Court some--

20 THE JUDGE: Maybe a proffer of
21 evidence?

22 MR. BOYLE: There's a-- The State
23 would, State would show that in regard to the
24 possession of controlled substance
25 methamphetamine that at the time he was taken to

1 the University of Utah that in the process of
2 receiving medical, emergency medical treatment
3 that either, I think it was the statement of the
4 officer that the doctor asked him are you on
5 anything and at that time the, according to what
6 the officer told me that the doctor, excuse me,
7 that Mr. Medsker then handed him a baggy
8 containing methamphetamine. And that would be
9 the evidence that the State would present against
10 Mr. Medsker.

11 MR. POORMAN: And, and the
12 paraphernalia charge would stem from the fact
13 that he had what was it eight, ten bottles of
14 Minithins which contain a precursor for
15 methamphetamine along with a lamp which I guess
16 they cook out the--

17 MR. BOYLE: Generally they use it for
18 purposes of (short inaudible, no mic).

19 MR. POORMAN: Yes. It's ephe--,
20 ephedrine.

21 MR. BOYLE: Yes. It's pseudoephedrine.

22 MR. POORMAN: Yes. That they remove
23 from the Minithins.

24 MR. BOYLE: There was also a pipe that
25 was found and located in the car as well. There

1 is some question as to who exactly, there is some
2 I guess question whether it was found in the
3 passenger's purse or whether it was found in the
4 car itself.

5 MR. POORMAN: And the DUI stemmed from
6 the fact that the EMTs first on the scene
7 detected on odor of an alcoholic beverage, that
8 coupled with the fact of his possession of the
9 methamphetamine led to the DUI charge.

10 THE JUDGE: Was there a BAC taken?

11 MR. BOYLE: There was a blood draw,
12 Your Honor, indicating he had a lot of
13 methamphetamine in the bloodstream.

14 THE JUDGE: Okay. All right. Thank
15 you.

16 Beyond the plea to the third degree
17 felony and the dismissal of the two Class B
18 misdemeanors is there any other aspect of the
19 negotiation?

20 MR. POORMAN: The State is requesting
21 a, a PSI on this one, Your Honor.

22 THE JUDGE: Okay.

23 MR. BOYLE: We don't object on that
24 request.

25 THE JUDGE: All right. Thank you.

1 Is, is that the negotiation in your mind,
2 Mr. Medsker?

3 THE DEFENDANT: Yes. It is, Your
4 Honor.

5 THE JUDGE: Do you feel pressured by
6 anyone to enter a plea of guilty this morning?

7 THE DEFENDANT: No.

8 THE JUDGE: Okay. The Court will
9 accept the waiver of the preliminary hearing.
10 I'm going to ask you now some questions. I'd
11 like you to listen carefully to these questions
12 so that I can evaluate whether your plea is
13 knowing and voluntary this morning.

14 Do you appreciate first of all that
15 under the law you're presumed to be innocent and
16 that presumption remains with you until the State
17 proves you guilty beyond a reasonable doubt?

18 THE DEFENDANT: Yes.

19 THE JUDGE: Please be advised that you
20 have the right to a speedy public jury trial and
21 to be represented by a lawyer at that trial. Do
22 you understand that right?

23 THE DEFENDANT: Yes, I do.

24 THE JUDGE: At trial you would also
25 have the right to cross examine the State's

1 witnesses, a right to subpoena your own witnesses
2 to assist you with your defense, you'd have a
3 right to make a statement to the jury or your
4 right to remain silent and thus put the State to
5 the full burden of proving your guilt without any
6 contribution from you. Do you understand that?

7 **THE DEFENDANT:** Yes.

8 **THE JUDGE:** Do you have any questions
9 about that?

10 **THE DEFENDANT:** (Inaudible
11 response, no mic.)

12 **THE JUDGE:** Do you understand that
13 you're waiving all of these rights by pleading
14 guilty this morning?

15 **THE DEFENDANT:** Yes.

16 **THE JUDGE:** Please be advised that any
17 appeal that you file after today will be limited
18 in scope because you've decided guilt for
19 everyone. Do you understand that?

20 **THE DEFENDANT:** Yes.

21 **THE JUDGE:** This plea of guilty to the
22 third degree felony carries a maximum penalty not
23 to exceed five years in the Utah State Prison and
24 not to exceed a \$5,000 fine. I'm not saying I'm
25 going to impose that but that's your maximum

1 exposure. Do you understand that?

2 THE DEFENDANT: (No audible response,
3 no mic).

4 THE JUDGE: I've heard a factual basis
5 for the plea and the Court finds based on that
6 factual basis or that proffer of evidence that
7 there is a factual basis for the plea.

8 Beyond that please be advised that in
9 order to convict you of the third degree felony
10 that the State would need to prove beyond a
11 reasonable doubt that you knowingly and
12 intentionally had in your possession a controlled
13 substance methamphetamine, a Schedule 2 drug.
14 Do you understand those elements?

15 THE DEFENDANT: Yes, I do.

16 THE JUDGE: Do you understand that,
17 that a plea of guilty is an admission of those
18 elements?

19 THE DEFENDANT: It's what?

20 THE JUDGE: That you're, pleading
21 guilty you're admitting the elements that the
22 State would have to prove. Do you understand
23 that?

24 THE DEFENDANT: Yes.

25 THE JUDGE: Before I accept your plea

1 do you feel a need for any reason to get further
2 advice from Mr., Mr. Boyle?

3 THE DEFENDANT: (Inaudible response, no
4 mic).

5 THE JUDGE: Okay. Are you satisfied
6 with the advice that he has given you?

7 THE DEFENDANT: (Inaudible response, no
8 mic).

9 THE JUDGE: Is there any statement in
10 advance of plea?

11 MR. BOYLE: No, Your Honor.

12 THE JUDGE: Okay. To the charge then
13 of possession of a controlled substance, a third
14 degree felony, how do you plead?

15 THE DEFENDANT: Guilty.

16 THE JUDGE: On motion of the State
17 under the--

18 MR. POORMAN: Move to dismiss the DUI
19 and the possession of paraphernalia, Your Honor.

20 THE JUDGE: Motion is granted. The
21 Court finds that this is a knowing and voluntary
22 plea. You nonetheless have a right to make a
23 motion to withdraw this plea if it's made in
24 writing within 30 days from today and is
25 supported by good cause.

ADDENDUM “B”
Sentencing Hearing

1 P-R-O-C-E-E-D-I-N-G-S.

2 MR. COOK: Judge, if we can call the
3 Medsker matter, please.

4 THE JUDGE: Yes. I was, you know, I
5 was sitting here thinking to myself we need to
6 call Medsker.

7 MR. COOK: I knew you were, Judge.
8 Mr. Medsker?

9 (Discussion regarding other case.)

10 THE JUDGE: Now this is, is State of
11 Utah versus Todd Michael Medsker.

12 MR. COOK: Glen Cook on behalf of
13 Mr. Medsker, Your Honor. It's set for
14 sentencing.

15 THE JUDGE: Yes. Go right ahead.

16 MR. COOK: Thanks. The agent
17 appropriately recommends limited jail, Judge,
18 noting in my reading primarily as a mitigating
19 factor the excessive hardship that would result
20 to his daughter. I would also note that the
21 guidelines support that. The guidelines call
22 for probation (inaudible word, no mic) jail.
23 The report correctly indicates he's employed.
24 More importantly his employer is aware of this
25 matter and has been apprised of it.

1 I wanted to point out to the Judge that
2 Mr. Medsker suffered rather severe injuries,
3 that's why I provided the letter to you. I
4 previously provided it to AP&P last week, or last
5 month before they offered their report as well as
6 a copy has been given to the prosecution. He
7 was life-flighted to LDS. He as you can see has
8 suffered neurological injuries. The bill I saw
9 was approximately \$28,000 for his own medical
10 care. And I point this out not to invoke pity
11 from you, Judge, not that you necessarily would
12 give it, but rather to indicate that through his
13 own actions he has suffered some consequences
14 here and that's one of the things that we deal
15 with in sentencing to make sure that the
16 defendant suffers consequences. He has through
17 his own actions and he understands that and he's
18 accepting responsibility for that.

19 He has lived in the same house for eight
20 years. He's indicated he lives with his, his
21 daughter, is a single parent. I've explained to
22 him in very blunt terms what would happen to his
23 daughter if he were to be imprisoned and
24 explained to him that that is a distinct
25 likelihood if he continues this course of

1 conduct.

2 His addiction, Judge, is
3 methamphetamine. And I don't think you'll argue
4 with me when I state my experience is that it
5 seems to be one of the most addictive drugs that
6 we deal with. The marijuana in my experience
7 makes them somewhat more stupid and has cognitive
8 issues. But the methamphetamine, it's just it's
9 so hard for them to overcome it. And that's not
10 an excuse but it explains the need for treatment
11 in this matter.

12 The prior possession charges, one was
13 methamphetamine, the other one was marijuana.

14 The primary issues, Judge, I think are
15 that he is employed which we don't always see,
16 he's the sole emotional and financial support for
17 his daughter. And I guess I'm making a plea on
18 her behalf for his benefit to protect her. And
19 he has through his own actions suffered serious
20 consequences with financial, physical and mental
21 repercussions to himself.

22 We'd ask the Court to seriously consider
23 home confinement or house arrest at his expense
24 up in Aida County. This will allow him to
25 continue his employment, continue in caring for

1 his daughter. Certainly in-home visits,
2 urinalysis are appropriate. NA is appropriate
3 and he's going to engage in NA. He is not in a
4 counseling program at this point.

5 One of the issues I think that we need
6 to be dealt with in counseling are some cognitive
7 and neurological issues as well. In my dealings
8 with him, while I'm not a mental health
9 professional by any means, I found some issues in
10 communicating rather simple ideas to him, we have
11 to repeat them and explain them in different ways
12 and sometimes I will say something and I will
13 just receive a stare and I have to repeat it
14 again. I think an example of this was seen in
15 his difficulty in initially completing the
16 paperwork AP&P gave him as seen in their letter
17 to you previously. It took him a great amount
18 of time. And he, he wasn't just dillydallying
19 over it, he has real issues right now in dealing
20 with that. I, I would suggest that counseling
21 include some neurocognitive issues as well to
22 help him through that.

23 That would with be our input, Judge.
24 Oh, I apologize. Just one other thing.
25 Recognition of his wrongdoing. The report seems

1 somewhat equivocal to me. I've talked to him.
2 His points and, and I'll try to make them
3 briefly. One, he just doesn't remember, he is
4 amnesic he indicates for not only that day, he
5 doesn't remember leaving Boise to make the
6 trip. So he is not disputing that there were
7 drugs in his system. He's aware there were
8 drugs in his system, he's not disputing that in
9 any way and he's taking the responsibility for
10 that. The issue is he doesn't know what
11 happened. It's almost in the nature of an
12 Albert plea in a sense in indicating to the Court
13 that he accepts responsibility but he's without
14 memory for it. That he recognizes he has a drug
15 problem, he's been candid about that with me and
16 he's authorized me to represent that to the Court
17 as well.

18 THE JUDGE: Does the State wish to be
19 heard?

20 MR. WRIGHT: Your Honor, the State
21 would concur in the recommendations of the
22 agency.

23 THE JUDGE: Mr. Medsker, you do accept
24 the fact that you have a problem--

25 THE DEFENDANT: Yes.